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IN THE

# Supreme Court of the United States.

ROBERT M. GREEN,

*Plaintiff in Error,*

*v.*

CHICAGO, BURLINGTON AND QUINCY RAILWAY COMPANY,

*Defendant in Error.*

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

## Brief for Defendant in Error.

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*For Defendant in Error.*

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CHICAGO BURLINGTON AND QUINCY RAILWAY CO.,

*Defendant in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

## BRIEF FOR DEFENDANT IN ERROR.

This is an action of tort to recover damages for injuries suffered by the plaintiff in error through the alleged negligence of the defendant in error. The injuries were received in a railway accident on the defendant's railroad in Colorado. The plaintiff in error is a citizen of Pennsylvania and a resident of the Eastern District thereof. The defendant in error is an Iowa corporation operating lines of railroad only west of Chicago and St. Louis.*

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* In an earlier case between these same parties, a rule to vacate the service was granted on the affidavit of Mr. Heller. Depositions were taken for the rule, as the local practice is. Counsel stipulated that Mr. Heller's affidavit should stand as his examination in chief (Record p. 7, at foot of page). His affidavit (Record, p.

This record involves the very important question as to whether or not the great interstate railway companies can be sued in the Federal courts in substantially every Federal district. All these companies solicit business through agents in the large cities and trade centres in practically the same manner as is disclosed by this Record. Is this doing business, and does this subject them to the Federal jurisdiction in every district where they maintain such agencies?

The sole question involved is:

Was the defendant, the Chicago, Burlington and Quincy Railway Company, "doing business" in Pennsylvania?

We submit that the question must be answered in the negative.

## THE FACTS.

The defendant does not operate a railroad in Pennsylvania nor maintain there a ticket office, nor sell tickets, nor receive freight nor issue bills of lading for freight. All tickets for passage over its lines are sold by initial lines in Pennsylvania. All freight shipped from Pennsylvania and "routed" over the defendant's line is received and shipped and bills of lading issued therefor by the initial line.

The defendant maintains a "District Agent" in Philadelphia, whose duties cover several states and are defined by him to consist in endeavoring by advertisement, traveling and personal solicitation, in his territory, to induce shippers of goods and prospective travelers to arrange with

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14) and his cross and re-direct examination (Record, p. 7), with the exhibits constituted the evidence, in that case. That case was discontinued and the present action was brought. Thereupon counsel stipulated (Record, p. 7) that that evidence should become the evidence in this cause.

initial railway companies shipping their freight out of his territory or selling them tickets to the West, to route such freight and sell such tickets by the Chicago, Burlington & Quincy Railway from its points of junction at Chicago and west thereof with the initial lines operating in his said territory.

This agent's district or territory consists of half of Pennsylvania, a part of New Jersey and all of the Atlantic States south of Pennsylvania as far as North Carolina, and West Virginia.

The agent sells no regular passenger tickets and neither receives nor collects any money for freight. He has no authority to fix rates.

In a "few" instances and "as a mere incident," the agent has sold orders for reduced rate tickets to railroad *employees* who already have tickets over intermediate lines and are entitled to reduced rates over defendant's lines. This is done to enable the employees to be identified at the Western Office. Traveling west, they would have to surrender their initial line ticket on the train and would thus be without means of identification at the western point of junction. Sometimes the agent receives money for these orders; sometimes not.

In *certain* cases, "solely for the convenience of shippers" who have received a bill of lading from an initial line for goods "routed" over the defendant's line, the agent receives such bills of lading and gives the shipper a receipt therefor in the form of a bill of lading over defendant's line. This receipt expressly provides on its face that it *creates no obligation* in respect of the freight and that it will not be in force till the goods are received by the defendant company. This is done only "when shippers request the same as a convenience". This practice is testified to as being customary with all interstate or trunk lines.

If an intending traveler calls on the agent and decides to travel West from Chicago or St. Louis over defendant's

line, the agent sometimes receives his money and goes to the Pennsylvania Railroad Company or some other initial line and purchases his ticket for him. This is an *"occasional"* transaction (Record p. 10. XQ. 26). Apparently the customer pays the money before receiving his ticket.

There is evidence, not deemed to be important, that the agent's business is conducted with the usual accessories: Thus he has an office with the defendant's sign on it, and a telephone with the defendant's name in the telephone directory. Its name is in the Philadelphia Directory. A railroad folder and some advertising matter is in evidence naming this agent as the "District Freight and Passenger Agent" of the defendant at Philadelphia.

It is clear that the agent's real duties in Pennsylvania are soliciting freight and passengers and that anything else he does is occasional and incidental. Thus the agent, Mr. Heller, says (Record p. 15):

> "My duties as an employee of the defendant Railway Company, consist in endeavoring, by advertisement, traveling and personal solicitation, in my said territory, to induce prospective travelers and shippers of goods to arrange with initial railroad companies shipping their freight out of my territory or selling them tickets to the West, to route such freight and sell such tickets by the Chicago, Burlington & Quincy Railway from its points of junction at Chicago, and west thereof with the said initial lines operating in my said territory."

Again, referring to the work done by Mr. Heller's assistants, Wheeler, Traveling Passenger Agent, and Cloud, Traveling Freight Agent, Mr. Heller testified (Record pp. 9, 12):

> XQ. 18. And the Traveling Passenger Agent, R. E. Wheeler, and the Traveling Freight Agent, B. C. Cloud, report to you at your office?
>
> "A. Yes, sir.

"XQ. 19. What are their duties?

"A. Their duties are to solicit passenger business, that is, the passenger agent, and the traveling freight agent solicits freight for the Burlington Route.

"RDQ. 45. When you mentioned the work done by Messrs. Wheeler and Cloud, did you mean that the work they do is the work which they do for you and is of the kind referred to in the affidavit in this case?

"A. Yes, sir; the kind I do myself.

"RDQ. 46. And nothing else?

"A. No, sir."

That the issuing of orders for tickets for railroad employees at reduced rates is infrequent, appears from Mr. Heller's testimony at page 14 of the Record, where he says:

"I have sold and I do sell a *few orders* for reduced rate tickets to railroad employees only" etc.

That the same is true of the issue by him of receipts for bills of lading appears from his evidence at page 15 of the Record:

"In *certain cases,* solely for the *convenience of shippers* of through interstate freight so routed, the bills of lading issued by the initial railroad companies are surrendered to me, and in lieu thereof, I issue receipts therefor" etc.

The agent's transactions in regard to tickets for ordinary passengers are shown to be only "occasional". They are not, in fact, sales of tickets but rather the purchase of a ticket from an initial line with the money of the traveler, furnished at the moment. It would not be straining the term to say that in making such purchase, Mr. Heller acts as the agent of the traveler. This part of the evidence is covered by the following (Record p. 10, XQ. 26, 27):—

"XQ. 26. You do *occasionally,* however, I infer from your affidavit, sell tickets?

"A. Yes, sir; and in such cases the money is

turned over to the initial line. We do not sell any Burlington Route tickets.

"XQ. 27. That is to say, if I understand you correctly, if a man bought a ticket at your office which entitled him to transportation to your line and over your line, what you would do if you took his money at all, would be to take his money and send it to some initial carrier, like the Pennsylvania Railroad Company?

"A. Yes, sir; or we would collect the money and deliver the ticket. I will explain. In the Gardiner case I dictated that letter personally. If Mr. Gardiner had called at our office for a ticket from Chicago to Denver, we would have gone to the Pennsylvania Railroad Company or the Philadelphia & Reading and gotten what we call a prepaid order issued by that line, pay them the money for it and hand it to the passenger. He would have presented that order on arrival at Chicago and gotten a ticket from Chicago to Denver and return, or one way, as the case might be."

Whether Mr. Heller is a "General Agent" or is a "District Agent" is, we deem, a matter of no importance. The company in its advertisements, Exhibits "C" and "D" designates him as "District Freight and Passenger Agent". In speaking of himself as a "General Agent" (Record p. 9, XQ. 15, 16), he evidently had reference to the size of his district and not to his powers, the extent of which are shown by the evidence and are not to be inferred from his title. It is well known that what are called "General Agents" of a life insurance company are mere solicitors of insurance attached to a branch office or to the home office without any other powers or duties. They are "General" because their territory is *general.**

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*The cases which discuss the question as to whether an agent is *"General"* or not, are those which turn upon the question as to whether an Agent holds a position of sufficient dignity and importance to make him a proper

We submit that the evidence shows that the business transacted in Pennsylvania by this agency was really the soliciting of freight and passenger business and that anything else done by it was merely occasional and sporadic.

We believe it to be well settled that a foreign corporation may solicit business in a given state through agents without being considered as "doing business" in that state; and that such an agent may be a resident agent and not a mere traveling agent, and, of course, may have an office in the state for the transaction of his business. The plaintiff's contention is therefore narrowed down to an endeavor to show that the *occasional* transactions of this agent brought this defendant within the jurisdiction of the court.

That is the plaintiff's main contention and is necessarily so, but before the brief of the learned counsel for the plaintiff reaches this part of their argument, it takes up certain matters which may require attention.

It is there urged "that there are certain elements which, if one or more of them exist, are usually considered to indicate the carrying on of a business". One of these is said to be the establishment of a permanent office to which all persons having business with a corportion may come.

But there is no doubt that a soliciting agent of a foreign corporation may have a permanent office in a state without "doing business" in that state, and it adds nothing to the argument to characterize the office of the defendant's agent as "one to which all persons having business with the corporation may come". Those who came to Mr. Heller's office to transact business of the kind which he is shown to have transacted, came there properly; those who came there for any other purpose must have gone there fruitlessly. He maintained his office for the purposes of that office, which

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representative of his Company for purposes of service, assuming that his company has already been shown to be within the jurisdiction.

purposes are confined to those that have here been proved. Nothing is gained by saying that all persons could have gone to that office.

A second "element" mentioned by the learned counsel for the plaintiffs is:

> "The employment of an agent within a state who is *advertised* as a *General Agent* of a corporation for such business as it transacts in the state."

The gist of this "element" is the term "General Agent". Now, obviously that which brings a foreign corporation within the jurisdiction as "doing business", is the business which it transacts, which must be of a nature to bring the principal within that category. That the agent is advertised as a "General Agent" cannot enlarge his powers. The name is not important. The powers of the defendant's agent and what he does are, for the purposes of this case, defined by the Record. As a matter of fact, he is *not* advertised as a "General Agent" but as a "District Freight and Passenger Agent". (Record, pp. 25, 26.)*

The plaintiff nowhere contends that the mere soliciting of freight business, without more, would bring this defendant within the Federal jurisdiction for the service of process. This being so, neither having an office, nor having

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*It is clearly an error on the part of plaintiff's counsel to say as on page 8 of their Brief, that "if within that district any one wished to correspond with the corporation on freight or passenger busines they were informed by the advertisement that Mr. Heller was the *General Agent* of the Company". And, referring to the final statement of the same paragraph of their argument, can it be contended that having an agent and an office in Pennsylvania "to receive communications" is "doing business"?

that office on a prominent street, with its name displayed, and even with clerks and stenographers and its name in the city and telephone directories constitutes "doing business". These are mere accessories. The question is what business was done, and this part of the plaintiff's argument seems to lose force by dwelling too much on these accessories.

The plaintiff's brief then urges that because Mr. Heller was the head of a district with traveling men under him and in receipt of correspondence from various directions as to freight or passenger business, we are brought within the jurisdiction of the Federal courts, but we submit that this does not advance the argument because it may relate to the soliciting of freight and passenger business alone, which has been shown not to be "doing business".

Up to this point then there seems to be nothing in the plaintiff's contention that is inconsistent with a strictly *soliciting* business.

The plaintiff's argument then takes up what it calls the "inference to be drawn from the making of contracts" in Pennsylvania. The first of these is said to be "contracts for the transportation of ordinary passengers".

Now, in the first place, the learned counsel for the plaintiff has cited no case in which it has been held that even maintaining a ticket office and regularly selling tickets is "doing business". But we need not take that ground. It is enough to say that there is no sense in which the agent in this case sells tickets in Pennsylvania. He testifies that he does not (Record, p. 10-XQ. 26). The Gardiner letter was explained by Mr. Heller (Record, p. 10). He testified, in effect, that if Mr. Gardiner had called at his office he (Heller) *would have gone to an initial company* and bought (for Gardiner) what he called a prepaid order issued by the initial company, paid them

the money for it and handed it to him. But wherein does this prepaid order differ from an ordinary ticket which he could have bought from the initial Company; and why should not a passenger solicitor oblige a prospective traveled whom he had persuaded to use his western line by taking his money and going to an initial company and purchasing a through ticket for him? Obviously, the "contract" in this case would be the ticket bought from the initial company and not any contract made by the agent direct with the traveler.

Further, the evidence shows that these transactions were only "occasional" (Record, p. 10, XQ. 26). We submit therefore that as this agent could solicit freight and passenger business in Pennsylvania, he did not "do business" because of this class of occasional transactions.

As to the second class of transactions which the learned counsel for the plaintiff in error calls "contracts for transportation of railroad employees at reduced rates", this class of transactions relates to matters of mere railroad administration, dealings with their own employees or those of other companies. It is done in a "few" instances, (Record, p. 14) and only for a special purpose—the identification of a railroad employee at the place where he must be identified. It is "a mere incident". In "many such cases" (Record p. 14) Mr. Heller says the employee receives his order without paying for it. This is not "doing business" in Pennsylvania. The argument is, we submit, *de minimis*.

The third instance of alleged contracts made by the defendant's agent in Pennsylvania is said by the plaintiff to be "Contracts for the transportation of freight". It is hard to understand how this transaction can be considered a "contract". The goods have been shipped over an initial line and are on their way to the defendant's connecting point. The shipper brings his initial line bill of lading to

the defendant who receives it from him, giving him what in legal effect is nothing more than a *receipt.* It may in terms embody an offer to accept the goods when delivered at a connecting point, but this does not alone constitute a contract. There is no acceptance of the offer. It does not bind the shipper, because he could stop his goods in transit, and it does not bind the defendant to do anything more than it is bound as a common carrier to do, viz., to accept the shipper's goods when tendered to it and to carry them.

Besides, the contractual relation is specifically negatived by a clause in the receipt (Record p. 28):

> "It is expressly understood and agreed that this bill of lading is issued at the request of and for the convenience of the shipper, and that said freight has not yet been received by the Railway Company, and that no obligation in respect to said freight is assumed by this Railway Company, nor will this bill of lading be in force until said freight is received by this Railway Company."

By this instrument the defendant says to the shipper, I will give you this receipt. If you deliver your goods to me at a connecting point on my line, it will be a binding contract, and I will accept and carry them for you, but I assume no obligation hereby and this instrument is not in force until you do so.

We consider the case to fall within the principle of *Holder* v. *Aultman,* 169 U. S. 81, which held that a contract signed by a local agent in one state which expressly stipulated that it was not to be "valid" unless countersigned in Ohio, was not a contract in Michigan. True, the validity of the contract at bar did not depend upon any approval at Chicago, but equally with *Holder* v. *Aultman,* it depended upon a future contingency, viz., the receipt of the goods.

Such is the view that the defendant's counsel took of the nature of its agent's duties, powers and transactions in Pennsylvania by reason of which the plaintiff seeks to draw the defendant within the jurisdiction of this Court. Does it do so?

The plaintiff's counsel cite no opinion of this Court to sustain their position. Indeed, their entire brief on this part of their case contains but a single Federal authority. The question must therefore be considered here as a new question to be decided upon the weight of the argument on either side. The plaintiff urges that it would be unjust to him to have to go to Iowa to bring his suit, but he went to Denver to travel, and certainly it would be as great a hardship to the defendant to be obliged to come to Philadelphia to defend his case, with its evidence all in Colorado. At least the balance there is equal.

If we consider a shipper of freight from Philadelphia with a right of action against the carrier, wherein is his hardship in having to go to Colorado to try his case, greater than to bring the carrier within the jurisdiction of the Federal court in Philadelphia. Colorado is the place of performance of the contract, why should it not be the forum for the trial of the cause. Thus, the hardships at least balance each other. The most suitable place for trial is usually the place where the alleged cause of action arose, whether in the case at bar or in the case of a shipper whose goods have been lost or injured in Colorado in transit.

But there is another consideration and a more important one. It appears from this Record that the defendant company has like agents and transacts like business in substantially every Federal District. Would it be urged that it is thus brought within the jurisdiction of every Federal District. If there were twenty persons injured in the railroad accident in which the plaintiff suffered, there might be suits in seven different Federal Courts by reason of the business transacted by Mr. Heller alone. As the defendant

appears by this record to have like agents performing like duties in all parts of the country, it is open to be sued in every Federal District in actions of contract and actions of tort.

Again, it is well known that all the trunk lines maintain like agencies for the solicitation of business in all parts of the country. We see their signs on prominent business streets in Washington, Philadelphia, New York etc. It appears in this case that these business methods are prevalent. Mr. Heller says (Record, p. 15), referring to his issue of receipts for shippers of bills of lading:

> "This method is customary with all the leading interstate or trunk lines throughout the country."

Again, Mr. Heller says (Record, p. 10, Q. 28):

> "The Burlington Route could get along in this territory without any agency if all the other agencies were to be abolished. The business can be done by the initial lines.
>
> "XQ. 29. So that the object in maintaining an office here is to keep the share of business of the Burlington Route in competition with your competitors who also have agencies here?
>
> "A. Yes, sir."

It appears then that if the plaintiff is correct in his contention, all the principal interstate and trunk lines are within the jurisdiction of the Federal courts and may be sued in the various districts. This would be an intolerable burden to the courts: it would often lead to many suits where one would suffice to settle all questions of law and fact; it would inevitably end by driving the railroad companies from their present method of maintaining these convenient offices in large cities and thus cause great inconvenience to the public. This argument from "inconvenience" the plaintiff does not meet. It need not be further elaborated.

This is not an attempt on the part of the defendant to ask this court to limit any existing jurisdiction of the

Federal courts: we here ask that the jurisdiction be not too widely extended. It must be remembered (and it is so said by plaintiff's counsel in their Brief, p. 6) that the earlier rule was that a corporation could be sued only in the state under whose laws it was incorporated. For obvious reasons this doctrine has given way to the present doctrine that if a foreign corporation is actually "doing business" in a state, it comes within the jurisdiction of the Federal courts of that state, but shall the doctrine be extended?*

The plaintiff's counsel is asking that the doctrine of "doing business" be extended to cover occasional and incidental transactions, while entirely failing to consider or discuss the most important of all arguments, that from inconvenience; this they make no attempt to do. Their argument depends upon a single Federal case, *D. & R. G. Co.* v. *Roller Co.*, 100 Fed. Rep. 738, and a New York case, *Tuchband* v. *Chicago & A. R. Co.*, 115 N. Y. 437, of which latter they say only that it is "a somewhat similar case".

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*While recognizing modern tendencies, we may sometimes, when they are pushed too far, recall the older doctrines with advantage. Thus Judge Sharswood, in referring to a Pennsylvania statute which in certain cases permits service outside of the state, said in *Coleman's Appeal*, 75 Pa. 458:

> "*A construction which leads logically to such a result cannot be sound,* and would require that the legislature should have used language making their intention unquestionable. It would be to impute to the legislature *a disregard of the most important principle of all municipal law of Anglo-Saxon origin*, that a man shall only be liable to be called on to answer for civil wrongs *in the forum of his home,* and the tribunal of his vicinage, though his property may be subject to the jurisdiction of the Courts of the country where it may happen to be."

The case of *Denver & Rio Grande R. Co.* v. *Roller*, 100 Fed. Rep. 738, is the sole Federal case cited by the plaintiff's counsel as sustaining their main contention. It is not really a case in point. The language quoted in the opposing Brief decides only that a certain local agent of the defendant railroad company was "a managing business agent" upon whom lawful service could be made under the California Code. The question that arises in the case at bar, as to whether the defendant was "doing business" in California, was not discussed in the opinion of the Court.

In the only other case cited by them on the point now under consideration, *Tuchband* v. *Chicago & Alton R. R. Co.*, 115 N. Y. 127, the question did not really arise as to whether the defendant railway company was *"doing business"* in New York. It appeared there that the Code provided for service on a foreign Corporation *"if it has property within the state."* The Court of Appeals found that the defendant *had* "property within the state", and disposed of that question in these words:

> "It being conceded that the cause of action did not arise in this state, we are to inquire whether (1st) the corporation *has property* within this state. As to that there are positive averments in the plaintiff's papers, both general and specific—general that it has property within the state, and specific, pointing out office furniture, tickets and other articles in its office, and cars for transportation."

The quotation from the opinion found in the plaintiff's Brief relates entirely to another and a different question:—whether the agent served was a *"Managing Agent"*, in the language of the Code. It is therefore irrelevant as to the issue in the case before this court. It appeared also, in that case that the railway company had *tickets* in New York (they must have been for *sale*), and "cars for transportation," and that it carries on "an extensive business" in the state.

Against this meagre citation of cases we ask the attention of the Court to a long list of Federal and other cases, all or some of which were cited by defendant's counsel in the argument in the Court below and *none of which* except the Earle case are now adverted to by Plaintiff's Counsel in their argument in this Court.

A persuasive case is the carefully argued and well-considered case of *Earle* v. *Chesapeake & Ohio R. Co.*, 127 Fed. Rep. 235, decided in the Court which decided the present case below.

In that case, while the Railroad Company defendant did not maintain its own exclusive office in Pennsylvania, it did "maintain a freight soliciting agency in connection with other transportation companies." Three of its directors and its assistant secretary (upon whom the service was made) lived in Pennsylvania. The railroad company's freight and passenger cars were drawn, separately or as solid trains, by the Pennsylvania Railroad Company across the state from Washington to Jersey City. The defendant's dining cars were hauled through Pennsylvania by the Pennsylvania Railroad Company and defendant's cooks and waiters operated these cars during transit. Judge McPherson held that the defendant was not "doing business" in Pennsylvania and vacated the service that had been made on the assistant secretary. In so holding he said:

> "The transportation is not the defendant's act, and the fact that its cars continue to be used, *for the convenience of passengers and shippers,* after the state line has been reached, is unimportant. To hold otherwise would make many railroad companies suable in nearly every state in the Union, for it is well known that a freight car of any railroad may visit many states before it is finally returned to its owners. * * * The sale of tickets over defendant's railroad by the Pennsylvania Company in Philadelphia is only made in connection with the Pennsylvania Company's own tickets and is largely *for the convenience of travelers.* If this

constitutes the transaction of corporate business in a state, it is possible that every important railroad company in the United States may be sued in this district, and in many other districts as well."

The plaintiff's counsel cites the case of *Van Dresser* v. *Oregon Railway & Navigation Company*, 48 Fed Rep., 202, as being at variance with *Earle* v. *C. & O. R. Co.*, 127 Fed. Rep. 235. In the Van Dresser case, however, service on the Union Pacific was correctly upheld, for it, with several roads, among them the Oregon Short Line which operated in Oregon, the state where service was made, had formed a combination called "The Union Pacific System" and contracts were made and *freight received* in Oregon for transportation over this System. The Court very properly held that as *part of the system was operated* in Oregon and contracts were made there and other railroad business was transacted there for the whole of the System, all or any part of the System could be served with process there.

*Maxwell* v. *A. T. & S. F. R. Co.*, 34 Fed. Rep. 286.

This case holds that merely maintaining a soliciting freight and passenger agency in a state does not constitute "doing business."

Mr. Justice Brown said:

"The general rule appears now to be well settled that a foreign corporation may be sued within any jurisdiction wherein it carries on an *important part of its business.*"

Again:

"What is the character or amount of business which the corporation must do to subject its agent to the service of process within the foreign state, is left in some doubt by the authorities. If it have an office for the general transaction of its business—the sale of

its goods, if it be a manufacturing corporation; or the making of contracts, and the *receipt of freight and passengers for transportation*, if it be a railroad,—it would appear to be sufficient. *Hayden* v. *Mills*, 1 Fed. Rep. 93; *Railroad* v. *Harris*, 12 Wall. 65."

The opinion proceeds to the effect that while an agent of an insurance company *who receives premiums and issues policies* is doing business in the state, yet if the agent be a local one with authority only to receive applications and give receipts therefor, service on such agent is insufficient to bind the corporation.

*Union Associated Press* v. *Times-Starr Co.*, 84 Fed. Rep. 419.

Here Judge Lacombe held that a salaried agent of a non-resident newspaper corporation empowered to solicit advertisements, make contracts and receive payment therefor, and who carries on the business in an *office having the name of the newspaper on its windows*, is *not* a managing agent through whom the corporation may be served under the New York Code. In so holding the Court said:

"It is hardly to be supposed that congress intended the Federal Circuit Courts to exercise such comprehensive and far-reaching jurisdiction, except when a case coming strictly within the language of the statute is made out. * * * The question presented is *one of* grave importance. Probably there are but few newspapers in the United States which do not publish advertisements originating in this city, or which do not solicit such advertisements here. If this and the adjoining (southern) district are, for that reason, to be considered the proper forum for suits against the owners of such papers, wherever they may reside and conduct their business of publishing and circulating such papers, *it seems probable that our calendars may be seriously overburdened.*"

*Fairbanks Co.* v. *the Cincinnati, N. O. & T. P. R. R.*, 54 Fed. Rep. 420.

Here the facts were substantially identical with those in the case at bar. The case was heard before Mr. Justice Harlan and Gresham and Woods, JJ. Judge Gresham delivered the opinion of the Court concurred in by Mr. Justice Harlan; Judge Woods dissented. The principles of law involved were carefully considered and the case has been frequently cited by other Federal Courts and always with approval.

The action was brought in Illinois against a Railway Company incorporated in Ohio which operated a line of railroad in Ohio and Tennessee. Summons was served in Chicago upon a person who was employed by the defendant for the purpose of soliciting passengers and freight to move over railroads which had connections with the defendant's lines. On one of the windows of the office occupied by this solicitor appeared the *initials*[1] *of the defendant's name* in large letters, and in the room, over the railing and counter, opposite the initials of the company, appeared the names of persons designated respectively as "Northwestern Passenger Agent," "*General* Agent" and "Contracting Freight Agent."

The Court in affirming the judgment of the Court below quashing the service of process, said:

> "It had no property or officer, and no office for the transaction of business, in the state. The room occupied in part by the persons mentioned in the marshal's returns was not an office, and those persons were mere *solicitors of business*, and not officers or agents of the defendant, within the meaning of the statute."

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[1]In common parlance and common use, railroad companies are most frequently designated by the initials of their names.

*Honeyman* v. *Colorado Fuel & Iron Co.*, 133 Fed. Rep. 96.

A foreign corporation had an office in New York for the registration of stock transfers, and its directors held meetings there and kept a bank account there. It was held that this was *not* doing business in New York and service should be set aside.

*Re Alabama & C. R. Co.*, Fed. Cas. 124.

In this case Woodruff, C. J., declined to adjudicate as a bankrupt in the Southern District of New York, a railroad company chartered under the laws of Alabama and other southern states. In so holding the Court said:

> "But the employment of means to secure or provide for these would, to him, be business; and, to a corporation, these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business. Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute 'carrying on business,' in the sense of the act? Has the term, 'carrying on business', the same meaning as 'transacting any of its business'? If the necessities or interests of a railroad company require that an agent should be sent to a timber region to purchase or otherwise procure (*e. g.*, by cutting, sawing, &c.) materials for its superstructure, is that carrying on business there? If it send an agent or agents to a city, the centre of capital, to negotiate its bonds and raise money in aid of the construction of its road, and such agency be continued for that purpose, and for receiving subsequent remittances and making payments of interest or other indebtedness, at an office provided therefor, is that carrying on business in such city, within the meaning of the act? I am constrained, not only by the considerations already suggested, but by what, upon the words themselves, should be deemed their proper interpretation, to answer these questions in the negative. There are, in the carrying on of a business, many affairs which are *merely inci-*

*dental,* and which may be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located; and such transactions may be of such frequent, or even daily, occurrence as to require an agency of considerable duration. It would seem to me greatly unjust and unreasonable to regard such transactions as a carrying on of business, in the sense of the law. 'Carrying on business' looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. Thus, the business of a railroad corporation is, by its charter, the construction, maintenance, and operation of a railroad. That is its business. In aid thereof, it may be necessary or expedient to employ agents and agencies—since it can only act by agents—in other places than those in which its business of constructing, maintaining, and operating the road can be done. But, the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the railroad company. That business cannot be removed. The company itself cannot transfer it. Agents, or officers who are agents, and only agents, may, from a distance, advise therein, give rules or directions to other agents for its management, but the *business of the railroad* company can only be done *where the railroad is,* or is to be, constructed, maintained, and operated."

*Boardman* v. *S. S. McClure Company,* 123 Fed. Rep. 614.

It appeared here that the McClure Company had a salaried employee at Chicago and maintained an office for him there. This office was advertised by the defendant as the "Western Office" of McClures and the agent designated himself on his letter heads and business card and on the window as the "Western Representative" of McClure's Magazine. His business was to travel through a certain territory and work up advertising business for the magazine. He quoted only fixed rates and his orders were subject to

approval by the home office. He made no definite contracts, but took orders and submitted them to the defendant. Collections were made at the home office. Service upon this agent was set aside.

*Frawley et al.* v. *Penna. Casualty Co.*, 124 Fed. Rep. 259.

To render service on a corporation made in a state other than that by which it was created, binding upon it in a personal action, the corporation must have been actually and *substantially* engaged in doing business in the state.

*Lamb* v. *Bowser*, Fed. Cas. 8,009, per Drummond, J.

Where an agent of a foreign insurance company, not authorized to make contracts for the company, but only to *receive money* or proposals or *premium notes* and forward them to his company for action, receives from a person in Indiana a proposal for insurance and a premium note and forwards them to his company, he is not "doing business" in Indiana.

*Pennsylvania R. R. Co.*, v. *Rodgers*, 44 S. E. Rep. 300; 62 L. R. A. 178.

In this case the Court of Appeals of West Virginia held that where the defendant railroad company in connection with other lines maintained in West Virginia an agency for the solicitation of freight, this did not amount to a "doing of business" within the state. The Court in so holding said:

> "The Pennsylvania Railroad Company has not in any sense made itself a West Virginia corporation by contributing to this joint traffic arrangement, although it may in some sense—a limited sense—amount to a doing of business within the state. * * * It will not be regarded as being within the state otherwise than

transiently. It *operates no lines here, runs no cars here, and perform none of its business as a common carries within the state.*"

In *Strain* v. *Chicago Portrait Co.*, 126 Fed. Rep. 831, it was held that merely soliciting business in another jurisdiction was not sufficient to constitute "doing business" there.

In *Bradbury* v. *W. & W. M. & S. Co.*, 130 Ill. App. 600 (1903), the defendant corporation was organized under the laws of the State of Washington to engage in mining in that State and in any other place within the United States or Canada. The Court in its opinion said:

> "It is specifically charged that the defendant company maintained an office in Waukegan, Illinois, where the secretary and treasurer kept the books and accounts of the company and its stockholders, and that the principal officers of the company and a large number of the stockholders were residents of Lake County, Illinois, and a majority of the stockholders resided in this state; that the shares of stock were issued from the Waukegan office, and that frequent meetings of the board of directors had been held in the City of Waukegan, and that official notices relating to the business of the company were published in Waukegan, and on the stationery used Waukegan was designated as the 'main office'; that the company rented an office, bought furniture and a safe, and placed it in the office for the use of the secretary and treasurer."

Then, after citing with approval *Mandel* v. *Swan Land Co.*, 154 Ill. 177, which held that the term "doing business" in the State of Illinios *had reference to the business for which the company was organized,* the Court said:—

> "If the jurisdiction of the court could be held to depend on whether the corporation was doing business in this state, within the meaning of Section 26 of the corporation law, as construed in the Mandel case,

the facts alleged in this bill, aside from the general inference drawn therefrom, wholly fail to show that the company was doing business in this state. Opening an office in Waukegan and placing a safe and some office furniture therein for the convenience and use of the secretary and treasurer, where he *issued certificates of stock, kept the books* and the *holding of directors' meetings* there, together with the other acts charged to have been done in Lake County, *bear no resemblance to the powers and objects of this corporation,* as set forth in the articles of incorporation. There is no pretense that the company owned any mining properties in this state, or *that it was doing a mining or smelting business here.* All of its mining properties were in the State of Washington, and not in Illinios."

In *Rich* v. *C. B. & Q. Ry. Co.,* 74 *Pac. Rep.* 1008, (Supreme Court of the state of Washington), the defendant (the same defendant as in the case at bar) was sued in that state and service was made on the company through its passenger and freight solicitor who had an office in Seattle. It was held that the activities of this soliciting agent amounted to mere advertising on the part of the company, and did not constitue "doing business" in the state.

(The folder and the Official Guide in evidence in the case at bar (Record, pp. 25, 26), give the name of "M. P. Benton, Agent, 103, Pioneer Square, Seattle, Washington." Apparently these documents played a part in that case.)

To the same effect is the case of *Kite* v. *Pittsburgh, Cincinnati & Chicago Railway Co.,* in the County Court of Cook County, Illinois, in July, 1905 (reported in 38 Chi. Leg. News, p. 57).

The facts in that case were almost identical with those in the case at bar, including the giving of receipts in the form of bills of lading to the shippers in exchange for the bills of lading issued by the initial carriers. Carter, J., held that the Norfolk & Western Railroad was not "doing business in Illinois and could not be sued there".

*People ex rel. Tower* v. *Wells,* 98 App. Div. 83 (New York). Affirmed without an opinion in 182 N. Y. 553.

This was a Maine corporation, having a plant in Massachusetts. It had a salesroom in New York where it had $8,000 worth of goods. It had no bank account in New York, but all checks &c. were sent to Boston. The Agent or Manager of the New York department drew weekly drafts on Boston for expenses. Some of the money received in New York was kept in a safe and was used to pay running expenses. About one tenth of the goods in the New York store were sold in New York City. It was held not to be such a doing of business as to make it liable to taxation as a non-resident doing business in New York.

## THE PENNSYLVANIA CASES.

In *Quarry Co.* v. *B. & N. Ry. Co.,* 204 Pa. 22, the Court, in referring to the Pennsylvania Act requiring the registration of all foreign corporations "doing business" in the state, said:

> "The purpose of the Act (of 1874) is to bring foreign corporations *doing business* within this state within the reach of legal process."

In *Mearshon* v. *Pottsville Lumber Co.,* 187 Pa. 12, it appeared that the plaintiff, a Michigan corporation, maintained a salesman and agent in Pennsylvania to take orders for goods and that the *contract* for the breach of which suit was brought, was made in Pennsylvania by this agent and by him sent to the foreign corporation, which performed the contract in Michigan. It was held that the plaintiff was not "doing business" in Pennsylvania within the intent of Act of 1874. The Court said:

> "Plaintiff is a corporation duly incorporated in the state of Michigan. *Its manufacturing operations*

> *are there conducted;* its capital is there invested. The *order for goods* in question was given to its salesman and agent in Pennsylvania and by him sent to the plaintiff who executed the order in Michigan. Under all the decisions this is *not* a doing of business in this state which makes it necessary to comply with the provisions of the act of 1874."

This case approved the case of *Blakeslee Mfg. Co.*, v. *Hilton,* 5 Pa. Super. Ct. 184, decided by an intermediate Appellate Court of Pennsylvania. In that case the Court said:

> "All that is here alleged is entirely consistent with the conduct of a foregn corporation, engaged in strictly interstate commerce. It may advertise its goods, *take orders, make contracts of sale respecting the same,* and ship them to customers in this state. It may also employ agents living in Pennsylvania to go from county to county, from town to town, and from person to person, *to secure orders."*

It was held that such acts did not constitute "doing business" in Pennsylvania.

In *Wolf Dryer Co.* v. *Bigler,* 192 Pa. 466, suit was brought upon a contract for the purchase of a brick drying machine. The plaintiff was a Michigan corporation which had sold the dryer to a resident in Pennsylvania through a salesman—the machine to be shipped into Pennsylvania. *Held* that the Michigan corporation was not doing business in Pennsylvania. Fell, J., in delivering the opinion of the Court, said:—

> "The fact that its agent came into this state and *made contracts* for machinery to be delivered here did not bring it within the inhibition of the act of 1874."

*Building Association* v. *Berlin,* 201 Pa. 1, was a case of a foreign building association loaning money to a resident

of Pennsylvania secured upon Pennsylvania real estate. The corporation maintained an agent in Pennsylvania, through whom applications for loans could be made to the home office in New York. It was held that it was not "doing business" in Pennsylvania. The Court said:—

> "The capital, if employed in the State of Pennsylvania, was so employed by a citizen of Pennsylvania, and not by the plaintiff corporation. In so far as the business of loaning money was concerned, it was carried on in the state of New York, and not in the state of Pennsylvania. If the operations of the plaintiff be measured by the test of agency, they will not be found, under the decision, to be in violation of the Act of 1874. The act of a foreign corporation in *selling goods here by agents,* and shipping the goods to purchasers, is *not* doing business in this State, within the prohibition of the act. The most that can be said of the plaintiff, is, that it had an agency at Bradford, by which its shareholders in that vicinity *were more conveniently enabled* to do business with the home office of the plaintiff corporation in New York."

We believe that this review of the Pennsylvania cases will suffice and that it is unnecessary to point out what we deem certain erroneous views in regard to them contained in plaintiff's Brief.

We submit that the judgment of the court below was correct and should be affirmed.

FRANCIS RAWLE,
*For defendant in error.*